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A Model for Court-Annexed Mediation

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I. INTRODUCTION

This Article presents a model for the evaluation of court-annexed mediation programs. The model is based on our experience evaluating a large-scale mediation program sponsored by the local bar association and funded by a grant and private donations. The model is intended to address a number of issues confronting evaluators of alternative dispute resolution (ADR) processes. First, we aimed to improve on current evaluation models by overcoming identified methodological weaknesses. Second, we attempted to design a model to serve the diverse objectives of the mediation program and our interests as evaluators. Finally, we recognized that the political reality of conducting an evaluation in our own community shapes the nature of the evaluation itself. Each of these factors leaves an imprint on the evaluation design and, consequently, on the results.

This Article, structured in three parts, describes our experience and the model. The first section explains the mediation program, our relationship to the program as evaluators, and the role of evaluation in program development. The second section discusses methodological weaknesses in current evaluation models, as identified by our literature review and survey of prevalent models. We then present our attempt to improve on these weaknesses. The third section briefly describes the nature and quality of the data generated by the model and speculates about the future implications of this evaluation. Our experience leads us to believe that this model, like many research designs, raises as many questions as it answers. The richness of the instrument lies in its integration into pro-

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gram activity, collecting data on an ongoing basis, and providing feedback to the program director for the continued refinement of an innovative program. Simultaneously, some of the soft spots in our data expose shortcomings and suggest further avenues of research and evaluation.

II. THE MEDIATION PROGRAM

The Center for the Study of Dispute Resolution (the Center), housed in the University of Cincinnati College of Law, is the evaluator of a court-annexed mediation program (the Program). Both began operations in the Spring of 1988. The central interest of the Center is the study of public policy conflict and the effect of informal dispute resolution on the framing and development of public policy issues. Additionally, the Center is interested in assessing the impact of informal resolution across a broad range of disputes.

The mediation program is a multifaceted demonstration project bringing mediation to several categories of disputes. Its intended purpose is to mediate a set of civil disputes referred to it by the local court. The Program also intends to mediate public policy disputes. In the first year of operation, approximately ninety percent of the mediation program's activities concerned the mediation of court-referred civil disputes. These cases are the subjects of our evaluation.

The mediation program was established by the local bar association and funded by a grant and private donations.[1] Initial funding will support the program for three years, during which time the value and cost effectiveness of mediating civil disputes will be demonstrated. The Program is actively developing a fee-for-service component to achieve self-sustained funding by the end of the third year.[2] In addition to fee-for-service revenue beginning in year three, the mediation program envisions a contract with the local common pleas court. Such assistance from the court will likely rely on evidence of the Program's cost effectiveness as adjunct to the Court.

The objectives of the mediation program are the following: (1) to relieve some of the caseload burden on the common pleas court by facilitating settlement of litigation; (2) to reduce the time and money spent

1. The grant from a local foundation provides a significant share of the Program's operating budget for three years. The foundation is affiliated with the National Municipal League and sponsors internships, workshops, individuals, colleges, and agencies in work related to participation in government or education about government.

2. The Program's fee-for-service component provides a number of services including mediator training, consultation, and mediation and negotiation to clients other than those referred to the Program by the common pleas court.

resolving litigation; (3) to preserve the relationship between disputants by encouraging accommodative resolutions; and, (4) to produce higher quality outcomes through a resolution process which encourages self-determination.

The fourteen judges of the common pleas court, a court of general jurisdiction, refer cases to the Program for mediation. Criteria for selection include: civil legal disputes involving a minimum of $25,000, as well as those involving complex rights and duties; the relationship of disputants (targeting cases where the disputants have an on-going relationship); and, the susceptibility to mediated settlement in the opinion of the referring judge. In addition, counsel must have a sufficient period for discovery in order to recommend settlement to his or her client. The mediation program does not accept *pro se* cases at present.

Measurable outcomes through evaluation are increasingly critical for either start-up or sustained funding. Therefore, evaluation is important for the following reasons: (1) public accountability; (2) internal organizational assessment; (3) program development; and, (4) the assessment of personnel and services. For the Program director and relevant stakeholders, the evaluation summarizes productivity and provides accountability for funding. As a result, the Program emphasizes quantifiable data—case volume processed, cost savings, speed of case processing, and measures of user satisfaction—for practical legitimacy and continuity.

For an academic body such as the Center, the focus of evaluation is somewhat different. In addition to providing empirical evidence regarding the quantifiable success of the program being evaluated, the Center sees the evaluation from a more academic perspective, recognizing the softness of the data while speculating on possible theoretical implications of the Program. Evaluation is a means of assessing and developing a research agenda ranging from empirical investigation[3] to theoretical speculation about the role of mediation in a democratic society.[4] The tension between the Center's theoretical bent and the Program's practical needs permeates the evaluation process making it a multi-level, multi-variate, and delicate experience.

The need to reconcile conflicting objectives is apparent in the most basic step of the design phase—drafting the evaluation objectives. Our experience provides a good example. For the Program director, the cen-

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3. For a discussion of the role of empirical investigation of alternative dispute resolution procedures, see Lind & Foster, *Alternative Dispute Resolution in the Federal Courts: Public and Private Options*, 33 FED. B. NEWS & J. 127, 131 (1986).

4. For a discussion of the effect of alternative dispute resolution procedures on democratic governance, see C. Ellison, Dispute Resolution and Democratic Theory (February 1989) (unpublished manuscript) (Paper prepared for delivery at the North American Conference on Peacemaking and Conflict Resolution, Montreal, Quebec, Canada).

tral evaluation objective was to demonstrate cost-effectiveness and to assess user satisfaction. The evaluation was viewed as a means of generating hard evidence of the Program's usefulness. Evaluation design is contoured to generate information in support of the Program's pragmatic preference—sustained operation.

The Center's evaluation objective was framed more broadly. We hoped to perform a comparative study of cost savings between mediated and nonmediated cases. Further, we wanted to discover whether there was any trend in the amount of settlement in mediated and nonmediated cases. In the absence of a randomized control group, our model could not be described as a scientific or a true experimental evaluation model. Rather, it took on the characteristics of a quasi-experimental evaluation, motivated by genuine research concerns, but contoured by the needs of the Program being evaluated.

In addition to assessing the efficiency of mediation, we designed the evaluation to answer two basic research questions. First, how do we improve our ability to make more informed choices about nontraditional, informal dispute resolution options? In answering this question, we also intend to address issues concerning who benefits from these mechanisms, how they benefit, and who should pay for the benefits. Second, how do we collect and analyze data that will validate those choices? Selecting and articulating the evaluation objectives is a critical first step in the design process that directly affects results.

After the Center's objectives were established, they had to be coordinated with the Program's needs. This coordination required negotiation between the Center's evaluators and the Program's director in order to establish the foundation for evaluation activity. These negotiations touched on several significant issues.

First, there is the issue of access. Even court-annexed mediation has a considerable private component. The mediator can claim a privileged relationship to the disputant and restrict access to some forms of information. Cases reaching impasse in mediation which continue on in the litigation process—a critical link in a comparative study of efficiency—may choose not to participate in the user survey.[5]

Second, mediators may simply resist close scrutiny by evaluators for a host of reasons.[6] The evaluator may be viewed less as an objective

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5. In our preliminary analysis of the Program, there is no significant difference in the survey response rate between mediation participants in cases settled and cases terminating mediation at impasse.

6. *See* Susskind, *Evaluating Dispute Resolution Experiments*, 2 NEGOTATION J. 135, 135-39 (1986); C. Honeyman, Problems In Evaluating Mediators (February 1989) (unpublished manuscript) (Paper prepared for delivery at the North American Conference on Peacemaking and Conflict Resolution, Montreal, Quebec, Canada).

scholar than as a judge of success or failure. The evaluation, quite simply, may pose a threat to program administration and personnel. This feeling is fueled by the distrust and poor communication that frequently separates the academic community and practitioners. This distrust presents a barrier to better study of mediation and must be dealt with early in the design phase of evaluation.

Collaborative efforts, such as evaluation, are a means of bridging the gap separating the academic community and practitioners. Access to information is likely to improve as rapport develops and the interests of both sides are communicated. Further, the exchange of perspective between practitioner and theoretician makes a contribution to the development of innovation. Practitioners, in any field, may feed on a steady diet of maxims, assuming that plugging into the right formula will produce a desired result.[7] Academicians, by contrast, approach these maxims with a scholarly skepticism. They have an obligation to test theorems and maxims, a process of theory development. The role of theory is to inform practice. Theory development, however, relies on the ability to test hypotheses in the laboratory, in this case, the field experiment. Accordingly, collaboration between the mediators and evaluators is essential to develop innovative dispute resolution processes.

III. Evaluation Model

To establish the Center's research agenda in the evaluation of mediation, we conducted a literature review to identify areas of consensus, disagreement, and gaps in our knowledge of the efficiency, effectiveness, and impact of mediation. Conclusions of the literature review are described below.

There appears to be little consensus regarding the efficiency of mediation. Interpretation of program efficiency is dependent on several factors: (1) the program design;[8] (2) the criteria selected to measure performance;[9] (3) the ability to overcome problems identifying the control group,[10] establishing the time frame for case processing,[11] reconstructing

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7. Pruit, *Trends in the Scientific Study of Negotiation and Mediation*, 2 Negotiation J. 237 (1986).

8. Felstiner & Williams, *Community Mediation in Dorchester, Massachusetts*, in Neighborhood Justice: Assessment of an Emerging Idea 111-53 (1982) [hereinafter Neighborhood Justice] (provides an outstanding example of the role of program design in the determination of efficiency).

9. R. Hofrichter, Neighborhood Justice in Capitalist Society 102 (1987).

10. Felstiner & Williams, *supra* note 8, at 130-32.

11. Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in Neighborhood Justice, *supra* note 8, at 237-38; *see*

traditional court costs, and defining the locus of resource consumption;[12] (4) the specification of whose efficiency is being evaluated (the disputant, counsel, the court, or the public at large); and, (5) the distinction between distributive and process efficiency.[13]

Although there is little consensus regarding the efficiency of mediation,[14] there is general agreement regarding the effectiveness of mediation,[15] where "effective" is defined as achieving settlement in a high proportion of cases,[16] without compromising the quality of justice. Additionally, researchers report high levels of user satisfaction and com-

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also Roehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161, 161-78 (1985) [hereinafter Roehl and Cook, *Issues in Mediation*]; *see generally* T. TYLER, THE QUALITY OF DISPUTE RESOLUTION PROCESSES AND OUTCOMES: MEASUREMENT PROBLEMS AND POSSIBILITIES 1988.

12. Feeney, *Evaluating Trial Court Performance*, 12 JUST. SYS. J. 148, 160 (1987) (discusses the shortcomings of current research on reconstructing court costs).

13. *See generally* Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659, 659-69 (1980).

14. The following researchers conclude that mediation is an efficient process by selected evaluation criteria: Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Costs*, 4 FAM. ADVOC. 26, 28 (1982) (the authors conclude that mediation "does not initially result in substantial or consistent cost savings to the clients. Mediation does, however, result in less relitigation—thus, less subsequent costs—and possibly less costs to the public."; Roehl & Cook, *The Neighborhood Justice Centers Field Test*, in NEIGHBORHOOD JUSTICE, *supra* note 8, at 109 [hereinafter Roehl & Cook, *Neighborhood Justice Field Test*]; Note, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, 1 OHIO ST. J. ON DIS. RES. 149, 162-63 (1984); Evarts, *Comparative Costs and Benefits of Divorce Adjudication and Mediation*, 19 MEDIATION Q. 69, 69-79 (1988) (Evarts bases cost savings projections on Pearson's study of the Denver Custody Mediation Project, 1980). *Contra* Tomasic, *supra* note 11; Merry, *Defining Success in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE, *supra* note 8, at 183-85 (finding the argument for efficiency unconvincing). Felstiner & Williams, *supra* note 8, defend community mediation programs in spite of high costs per case.

15. The following sources conclude that mediation is effective based on criteria used for measuring program performance: *see generally* Pearson & Thoennes, *supra* note 14; McEwen & Maiman, *Small Claims Mediation In Maine: An Empirical Assessment*, 33 ME. L. REV. 239, 264-67 (1981) [hereinafter McEwen & Maiman, *Mediation In Maine*]; McEwen & Maiman, *Mediation In Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 20, 22, 47 (1984) [hereinafter McEwen & Maiman, *Compliance Through Consent*]; Roehl & Cook, *Neighborhood Justice Field Test*, *supra* note 14; Note, *supra* note 14; Davis, *Community Mediation In Massachusetts: Lessons From a Decade of Experience*, 69 JUDICATURE 307, 307-09 (1986).

16. Pearson & Thoennes, *supra* note 14, at 30 (report a 58% settlement rate); McEwen & Maiman, *Mediation In Maine*, *supra* note 15, at 249 (report a 66.1% settlement rate); McEwen & Maiman, *Compliance Through Consent*, *supra* note 15, at 26 (report a 77.7% settlement rate in cases electing mediation, and a 73.2% settlement rate in cases ordered to mediation); Roehl & Cook, *Issues in Mediation*, *supra* note 11, at 161 (review a number of mediation studies and conclude that settlement rates in the neighborhood justice experiment range from 60% to 90%); Evarts, *supra* note 14, at 73 (states that Pearson's Denver Custody Mediation Project experienced an 80% settlement rate. Pearson's longitudinal study is the basis for Evart's national cost savings projection.

pliance, with agreement ranging from sixty to ninety percent.[17] Research on recidivism is methodologically weak and too infrequently studied.[18]

Critics of alternative processes argue that mediation merely creates an illusion of participation, voluntarism, and consensus.[19] The central criticism surrounds the privatism of mediation and the consequent reduction in publicity of mediation processes.[20] In other words, the parties control the mediation process, and often the results, to the exclusion of public involvement or review.[21] Mediation as social policy/political theory is largely unexplored in the evaluation of mediation.[22]

The influence of forum and process on outcome has been studied empirically;[23] yet, questions about the efficacy of mediation remain.[24] Efficiency, effectiveness, and efficacy form a triad that is inextricably linked to defining quality in ADR. While each term presents its own definitional difficulties, consensus definitions of efficiency and effectiveness can be found with relative ease. Efficiency is equated with cost savings; effectiveness is aligned with user satisfaction and compliance. Efficacy is the

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17. McEwen & Maiman, *Mediation In Maine*, *supra* note 15, at 261, 263-64; McEwen & Maiman, *Compliance Through Consent*, *supra* note 15, at 21; Vidmar, *The Small Claims Court: Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 542-45 (1984) [hereinafter Vidmar, *The Small Claims Court*].

18. Tomasic, *supra* note 11, at 241.

19. *See generally* R. ABEL, THE POLITICS OF INFORMAL JUSTICE (1981); Tomasic, *supra* note 11, at 228; Harrington, *The Politics of Participation and Nonparticipation in Dispute Processes*, 6 LAW & POL'Y 203, 218, 220-23 (1984); Erlanger, Chambliss & Melli, *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context*, 21 LAW & SOC'Y REV. 596, 600, 602-03 (1987); *see generally* R. HOFRICHTER, *supra* note 9.

20. For a discussion of the effect of privatizing dispute resolution, *see* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668, 676-79 (1986); Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 13, 17, 21-25 (1987).

21. *See generally* C. Ellison, *supra* note 4.

22. *See* Edelman, *Institutionalizing Dispute Resolution*, 9 JUST. SYS. J. 134, 134-50 (1984); Adler, *Is ADR A Social Movement?*, 3 NEGOTIATION J. 59, 68-70 (1987); Sarat, *The 'New Formalism' in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695, 695-715 (1988); Selva & Bohm, *The Informalism Experiment*, 29 CRIME & SOC. JUST. 43, 51 (1987).

23. *See* McEwen & Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439, 445-47 (1986) [hereinafter McEwen & Maiman, *Disputing Forum and Dispute Characteristics*]; McEwen & Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 LAW & POL'Y 257, 262, 266 (1986); Tyler, *What is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness Of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128, 131-32 (1988) [hereinafter Tyler, *Procedural Justice*]; Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 69-71 (1984) [hereinafter Tyler, *Perceived Injustice*].

24. *See generally* Vidmar, *The Small Claims Court*, *supra* note 17, at 515-50; Vidmar, *Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155 (1987) [hereinafter Vidmar, *Case Characteristics*].

least explored, owing to the difficulty of determining the relationship of outcome and process and to the amorphous nature of identifying fairness.

The literature review helped us design the evaluation model and outline research questions. In the first phase of the evaluation, we elected to: define the locus of cost savings in the mediation program; determine how the cost savings might influence program funding; and assess how the court-annexed mediation program impacts the efficiency of the sponsoring court. In our case, the efficiency assessment concerns reducing transaction costs. Put most simply, this part of the evaluation attempts to answer the question: Is mediation cheaper than litigation?

Regarding the effectiveness of mediation, we wanted to expand the notion of effectiveness beyond two traditional criteria of success: (1) user satisfaction, referring to the disputant; and, (2) the judicial definition of success relating to efficiency, chiefly settlement rate and speed of case processing.[25] Nearly all evaluation research of mediation emphasizes user satisfaction as a criterion of success. Our evaluation design expands the definition of "user of mediation" to include disputants, counsel, insurance company representatives who participate in the conference, and the referring judges of the common pleas court. We regard each as a significant user of the mediation service.

The judicial definition of success, settlement rate and speed of case processing, assumes that settlement is a positive outcome. Too often, criteria for success in mediation are rooted in a philosophy that conflict is socially disruptive,[26] that settlement is a positive outcome of dispute processing,[27] and even more disturbing, that settlement equates with justice. Ultimately, the criteria by which we evaluate mediation must be reexamined.

The effective mediation program, as we define it, is one that produces an output (dispute resolution) that adds to the aggregate output of the traditional court system. Our research hypothesis is that mediation produces a higher quality resolution in certain archetypal cases. Testing this hypothesis was especially appropriate in the case of a program which processes complex civil litigation, and where disputants may have an ongoing relationship.[28]

Once our research questions were outlined, we turned to the assessment of methodologies. We contacted prominent researchers in the field

25. Merry, *supra* note 14, at 182.
26. R. ABEL, *supra* note 19, at 284-86, 288; Sarat, *supra* note 22, at 695, 700, 708.
27. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-85 (1984).
28. Harrington, *supra* note 19, at 208-09; McEwen & Maiman, *Mediation In Maine*, *supra* note 15, at 251.

including Barbara Meier of the Federal Judicial Center, Deborah Hensler of The Institute of Civil Justice at the Rand Corporation, Janice Roehl of the Institute for Social Justice, and Jane Orbeton of the Court Mediation Services in Maine. In addition, we studied the work of John Barkai of the University of Hawaii School of Law, and Craig McEwen at Bowdoin College. After examining their experiences and concerns, we enhanced our evaluation design and work plan.

From a review of prevalent evaluation models, we identified several weaknesses. They include:

(1) the lack of a conceptual framework to study alternative processes;
(2) little reference to the heterogeneity of mediation;
(3) the implementation of evaluations only at an early phase of program development, which questions the representativeness of the evaluation data; and,
(4) too much reliance on user satisfaction as a measure of effectiveness.

We attempted to address each of these weaknesses in constructing an evaluation model. First, we developed a conceptual framework for mediation. We view mediation as a dispute resolution technology applied as an intervention in conflict. The technology (mediation) is a process applied within, and influenced by, the framework of a specific legal or extra-legal structure (forum) which produces some outcome (resolution or impasse). Forum influences the way in which a dispute is framed, channeled, and resolved. The mediation process varies greatly in its application, ranging from divorce and child custody conferences that borrow on the family counseling model to the mediation of contract and labor disputes more similar to arbitration in style. Consequently, specification of structure and process is critical to the interpretation of outcome. Measures of settlement rate, case processing speed, cost to the system or users, and compliance rate may satisfy stakeholders, but they are meaningful to the research community only within the context of program structure and specified process.

Specification of variables which comprise structure, process, and outcome is essential to the interpretation of outcome. Table 1 lists variables for structure and process which might influence outcome:

Table 1. MODEL VARIABLES

STRUCTURE	PROCESS	OUTCOME
Program mission	ADR technology	Case volume processed
Program jurisdiction	Legal culture	Settlement rate
Referral sources	The presence and role of counsel	Case processing speed
Relationship to court	Participatory nature of proceedings	Cost per case
Funding source	Mediator role	Nature of settlement agreement
Criteria for case selection	Physical environment	Reduction court backlog
		User satisfaction
		Level of compliance
		Perceived legitimacy of process

There are examples in the literature that illustrate the importance of specifying these interactive variables in the interpretation of evaluation findings.[29] Felstiner and Williams evaluate the mediation program in Dorchester, Massachusetts, and explain the program's high cost per case through an analysis of the intense style of mediation practiced in the program.[30] They termed the process "deep" mediation.[31] Cost per case for mediation was estimated to be 2.7 times greater than the cost of formal adjudication[32]—a fact that might have labeled the program as inefficient, save for the researchers' specification of case type processed, mediation technology, and impact on recidivism.

In a more recent study of public sector mediation in Iowa, researchers found that settlement rates varied from 40 to 88.6 percent[33] depending on the source of mediator (Federal Mediation and Conciliation Service, Public Employment Relations Board, or ad hoc mediators). Mediators from the three groups have varying degrees of training and have different styles in applying mediation techniques. Researchers concluded that variation in settlement rates was the result of an "interaction between techniques and the training and experience necessary to master these techniques."[34] Characteristics of the process are credited with affecting outcome.

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29. Pruit, *supra* note 7, at 238. Pruit notes that "good theory usually specifies moderator variables that influence the way other variables relate to one another."

30. Felstiner & Williams, *supra* note 8, at 111-53.

31. *Id.* at 140. The researchers estimate that the Dorchester mediation process requires four times as much time per case as a variation on the process in other programs.

32. *Id.* at 144-45. Estimated cost of mediation in the Dorchester program is $403 and the estimated court cost saved by diversion to the program is $148.

33. Dilts & Haber, *The Mediation of Contract Disputes in the Iowa Public Sector*, 18 J. COLLECTIVE NEGOTIATION 145, 148-49 (1989).

34. *Id.* at 149.

In another example, case characteristics are presumed to have greater influence on outcome than either process or forum. Vidmar[35] challenges the role of process and forum in producing high settlement rates and levels of compliance as described by McEwen and Maiman.[36] In a mediation program yielding similar outcomes, Vidmar was able to explain nearly all the variation in outcome from traditional processes, by creating a control variable for the defendant's dimension of admitted liability. Vidmar concluded that case characteristics, specifically dimension of admitted liability, were more influential than forum or process in determining outcome.[37]

McEwen and Maiman[38] and Tyler[39] empirically studied the role of process in creating perceptions of legitimacy, another outcome measure. Both found evidence that characteristics of the process (e.g., privacy, self-determination, perceived neutral role of the mediator, and the removal of linguistic and structural barriers common to the adversarial process) influenced disputant perceptions of the legitimacy of the dispute resolution process, and hence of our legal institutions. Enhanced legitimacy, they purport, influences compliance.

This form of empirical analysis is not typical of mediation program evaluation. Most program analyses are conducted to satisfy stakeholders. Stakeholders concentrate on outcome measures such as case volume, cost per case, processing speed, and settlement rate. Not surprisingly, they may have limited, if any, interest in the theory of dispute resolution—a luxury and mainstay of academics. Outcome for the stakeholder summarizes productivity and provides accountability.

These figures, which are measures of outcome, are relevant to the research community because they explore the relationship of process and outcome. Therefore, care must be taken to monitor the interrelationship between method and outcome. The resolution of a dispute through an informal process such as mediation will most likely differ from a similar dispute resolved through formal adjudication. Second, by describing interactive variables such as the level of premediation negotiation, the par-

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35. Vidmar, *The Small Claims Court*, *supra* note 17, at 538-45; Vidmar, *Case Characteristics*, *supra* note 24, at 161-63.

36. McEwen & Maiman, *Mediation In Maine*, *supra* note 15; McEwen & Maiman, *Compliance Through Consent*, *supra* note 15.

37. Vidmar, *The Small Claims Court*, *supra* note 17, at 538-45; Vidmar, *Case Characteristics*, *supra* note 24.

38. McEwen & Maiman, *Compliance Through Consent*, *supra* note 15, at 11-49; McEwen & Maiman, *Disputing Forum and Dispute Characteristics*, *supra* note 23, at 439-47.

39. Tyler, *Procedural Justice*, *supra* note 23; Tyler, *Perceived Injustice*, *supra* note 23; Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987) [hereinafter Tyler, *The Psychology of Disputant Concerns*].

ticipatory nature of the process, the role of counsel, and the assertiveness and tenacity of the mediator, we can make inferences about causality. Third, the inferences support critique and theory-building, and enable us to speculate about the role and consequences of informal justice systems in modern democratic society.

Establishing a conceptual framework and developing a model for mediation addresses the first two deficiencies we noted in current evaluation methodologies: a weak conceptual framework for conducting mediation evaluation, and poor specification of the mediation process as technology. Addressing the third concern—the representativeness of data, and the need for ongoing program feedback—we structured the evaluation as a component of the program's data management system.

Data collection for the evaluation is a function of the program's record-keeping system. The data base is programmed to collect and organize data for periodic analysis. The coding of variables such as case type, phase in case life cycle, stage of discovery, and level of premediation negotiation, must be in the form of meaningful yet manageable categories. This information is useful for the management of the program and easy for the evaluator to access.

Building the intake portion of the evaluation into the program's data management system provides three advantages. First, data for evaluation is collected at little additional expense to the program once the analysis is structured and the data needs are defined. Estimated costs for mediation program evaluation range from $10,000 to $20,000 (as reported by evaluators we interviewed). Much of this expense derives from the ongoing management of evaluation activity, chiefly data collection. Programming the record system to capture needed information bypasses the costly and time-consuming activity of data gathering. Once program records are defined, program personnel perform the data collection function in the process of entering information on case records. The data base accumulates at no additional expense or activity to the program.

Second, the relational data base is capable of generating a wide variety of reports on program activity. For example, program managers can produce summary statistics on the flow of referrals, settlement rate, or resource use by issuing simple commands on the personal computer. These reports provide important feedback to mediators and stakeholders regarding the efficiency and effectiveness of the program. The evaluation plays a formative role in program development. Deficiencies can be identified and changes made to correct them. Refining program design is an ongoing process of identification, intervention, and reassessment.

Third, information stored in the data base becomes the basis for longitudinal studies of mediation. This overcomes the problem of the "snapshot" evaluation. Most often, program evaluation takes place in the early

stage of program development. We wanted to know if there are gains in efficiency and effectiveness with program maturity. Longitudinal study allows us to develop this information. Additionally, the system can be designed to select cases for follow-up regarding implementation of agreement and compliance. A much understudied area is the long-range effect of mediated settlements. Longitudinal study can address concerns about the equity of informal dispute resolution.

Incorporating program assessment into the planning process was beneficial in our case. We were able to devise the evaluation plan during the final planning phase of the Program. Working closely with the Program's director, we focused on objectives and devised outcome measures before cases were mediated. Thus, the Center's study and the Program's work were coordinated, with program development and evaluation refinement running a parallel course.

A fourth identified weakness in evaluation methodology is an over-reliance on user satisfaction as a measure of effectiveness,[40] where user is defined as disputant. This information is accessible and affordable, but its reliability is questionable beyond the immediate satisfaction of the participants. Disputants are satisfied to end a conflict, yet they have little or no comparative basis against which to measure the quality of outcome. In our evaluation design we expanded the definition of "user" to include all participants in the mediation conference and the judges of the referring court. Still, the problem that user satisfaction contributes little to our understanding of the broader impact of mediation in the community remains.

Analysis of the Program's impact includes determination of case type most susceptible to mediation, the nature of mediated settlements, disputant perception of fairness of process and outcome, and perceived gain and loss, vis-a-vis mediation. Program impact should not be simply equated with reduction of the court's caseload. The quality of mediated dispute resolution may be a more meaningful measure of impact. A qualitative analysis made by the referring judges is planned for the second phase of the program evaluation.

Into this framework, we integrated research questions from critical studies of dispute processing. We are interested in analyzing: (1) the influence of outcome on perceptions of procedural fairness; (2) the relationship of a perceived neutral mediator in creating perceptions of fairness; (3) the ability of mediation to narrow and/or clarify complex issues; and, (4) the notion that consensus breeds compliance. In addition, the study design is exploring user impression about the role of mediation

40. Harrington, *supra* note 19, at 212.

in preserving an ongoing relationship, and the extent of negotiation in traditional litigation.

Our goal was to achieve a design that would generate information that could be applied both to the program, as recommendations for improvement, and to broader policy questions concerning the merit of the mediation process in general. After many revisions, consultation with experts, and a test of our survey instruments, we arrived at an evaluation format that served the needs of both program administration and the research objectives of the Center. The final design is generating summary measures of Program performance, recommendations for procedural change, information on referral patterns, community need for mediation services, and information that can be applied to broader research questions of the field.

Information for the evaluation is drawn primarily from three sources: (1) case data forwarded to the Program by the referring judge; (2) a mediator report which provides information about mediation conference activity and outcome; and, (3) a survey instrument sent to all mediation participants.

Case data are entered into the relational data base by Program personnel at the time of referral. This includes case type, dates of filing and referral to mediation, information on trial date, amount of claim and counterclaim where applicable, stage of discovery, and level of premediation negotiation.

A mediator report is also filed. This report describes activity and resource time applied to each case. At the time mediation is terminated, either by means of agreeing on settlement terms or choosing to terminate mediation at impasse, the outcome of the process is recorded by the mediator. The mediator report describes progress in terms of delineating issues, narrowing issues, or facilitating the legal research of complex disputes. Information about postmediation pretrial settlement is recorded as well.

The assessment of user satisfaction is based on user responses to a questionnaire. Questionnaires are mailed within seven days of the termination of mediation. All users of the service are surveyed, regardless of whether the case is settled or reaches impasse. Questions that probe impressions of the process are identical for participants of both settled and unsettled cases. Thus, the hypothesis that decision outcome does not significantly influence perceptions of procedural fairness can be tested. Participants in cases settled by mediation are presented with questions about the fairness of the settlement agreement. When impasse terminates cases, participants are asked to assess the effect mediation dialogue may have on the future resolution of their case and how it may influence any ongoing relationship with the other party to the dispute.

The questionnaire format combines closed- and open-ended questions. A Likert-type scale (closed-ended) is used as much as possible for purposes of meaningful analysis. Open-ended questions are included to invite user response to the mediation process. In the evaluation of an innovative program, open-ended questions help identify unintended program effects. This methodology borrows from the responsive evaluation model.[41] In contrast to the objectives based model which measures what we expect to find, the responsive model looks for unintended effects. The responsive model is especially appropriate in the evaluation of innovative programs.

In the absence of a control group, the comparative efficiency of mediation and adjudication is speculative. Users of mediation, however, do have a perceived gain or loss. We are asking all attorneys in successfully mediated cases to estimate their time savings in hours. Likewise, they are asked to evaluate the outcome of mediation against the outcome they would expect from a trial. Information from this portion of the evaluation is subjective because the outcome of resolution by trial can not be known.

Disputants are asked to assess outcome as well. Unlike attorneys who have experience on which to base comparative outcome, disputants have limited, if any, experience to compare outcome. Their perception of trial outcome may be unrealistic. Not surprisingly, half of the disputants in our sample described the mediated outcome as "not as good as the expected outcome of a trial," but they were quick to qualify this response with a statement indicating that settling the dispute through mediation reduced expenses such as the cost of deposition and time away from work. Disputant assessment of outcome is made in terms of a tradeoff. Settling for a lower dollar award in mediation, as some disputants indicate, appears to be offset by avoiding the social costs of further litigation.

The perceived quality of outcome tells us a good deal about the utility of alternative dispute resolution processes. Ultimately, the value users place on a service will influence consumer preference in the marketplace. Disputants may simply prefer mediation to negotiation.

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41. Edward Suchman, Professor of Sociology at the University of Pittsburgh, recognized the importance of measuring unanticipated or unintended effects in social science research. Suchman's work was the springboard for the development of new models for evaluation (1967-71), including the responsive model. E. SUCHMAN, EVALUATION RESEARCH 126-28 (1967).

IV. Quality of the Data and Potential Applications

At the time of this writing the evaluation model has been in place about a year. Although it is too early to assess fully the success of mediation, the evaluation is generating a great deal of useful information. The preliminary analysis conducted nine months into program operation has produced information that provides summary productivity measures, feedback to the legal community on attorney satisfaction with the mediation process, information on user cost savings useful in devising a fee schedule for a fee-for-service component, and data that tests a number of research hypotheses about the mediation process.

We are experiencing a high level of user satisfaction among participants both of cases settling and of those reaching impasse. Regardless of outcome (settlement or impasse), disputants and counsel alike describe the mediation process as fair, the mediator as unbiased, and their overall impression of the process as very positive. Failure to achieve settlement is frequently attributed to the intransigence of one or more parties to the dispute, and only infrequently to case characteristics (substantive legal questions). Surprisingly, failure to reach settlement is occasionally attributed to too little direction or input from the mediator. Attorneys and clients alike have, on occasion, suggested that the mediator be more forceful in keeping the negotiation process alive by keeping parties at the bargaining table. This response counters concern that mediation may be more coercive than proponents claim.[42]

Estimated cost savings are made by both disputants and their attorneys. Neither is asked to estimate a dollar savings. Rather, attorneys estimate time savings by reaching settlement through mediation instead of through trial. Estimates range from 10 to 150 hours saved, averaging 40 hours per case reaching a mediated settlement. For the participant, mediation may affect real cost savings. From an economic perspective, however, it is unclear whether there are net gains in efficiency. Attorney time savings appear to be passed on to the client in the form of lower attorney fees—not funneled into paying for the mediation service. Defining the locus of cost savings is a persistent problem in evaluation research. Our evaluation design has not overcome this methodological weakness. Data collected over a two-year period, however, may produce better information on the cost savings to disputants and counsel. This information, in turn, can establish a rationale for determining who in a community should pay for the mediation service.

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42. *But see* R. Abel, *supra* note 19, at 272; R. Hofrichter, *supra* note 9, at 118-28; Erlanger, Chambliss & Melli, *supra* note 19, at 583.

A second weakness of our economic analysis is determination of the effect of diverted cases that revert to the court for resolution. The cost savings realized by disputants resolving a conflict in mediation may be largely offset by those cases continuing through the litigation process. Such a comparative analysis of efficiency is the basis of an enhanced evaluation model, proposed for the second year of program operation.

The first phase of the evaluation is largely descriptive, observing the flow of referrals, case type, settlement rate, application of mediator resource in case processing, and user response to the mediation process. In the conservative legal community, orientation to alternative processes requires time, exposure, and re-education. The response to date is very positive. There are signals that mediation has a net positive effect. Mediation participants uniformly expect that the settlement agreement will be upheld by all parties to the agreement. All survey respondents in settled cases answered affirmatively when asked whether they expected the other party(ies) to the agreement to uphold the terms of the settlement. The origin of this bargaining in good faith form of thinking needs to be explored in the next phase of the evaluation. There may be elements of the mediation process which influence compliance with the agreement. This would support the thesis posited by McEwen and Maiman[43] and Tyler[44] that procedural attributes of mediation enhance the legitimacy of the justice system.

As noted previously, the questionnaire format is styled to invite user comments, with the intention of eliciting either unintended or overlooked effects of mediation. To cite one example, a number of attorneys ascribe the dynamics of mediation to center on the mediator's ability to recast the value of the case. The adversarial model compels counsel, as an advocate, to pursue maximum compensation. In spite of recognized social costs, attorneys get locked into this proactive stance. Attorneys in our survey indicate that they welcome the objective re-evaluation given by the mediator. The mediator's interpretation of the merits of a case is accepted because he or she is viewed as a disinterested third party. The same message coming from a partisan attorney is suspect. This case assessment strongly suggests that law can play an important role in mediation.

This is just a sample of the type of information derived from the evaluation. The structure of the analysis and the survey instrument appear

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43. McEwen & Maiman, *Compliance Through Consent*, *supra* note 15, at 11-49; McEwen & Maiman, *Disputing Forum and Dispute Characteristics*, *supra* note 23, at 439-47.

44. Tyler, *Procedural Justice*, *supra* note 23; Tyler, *Perceived Injustice*, *supra* note 23; Tyler, *The Psychology of Disputant Concerns*, *supra* note 39.

reliable as there is a high degree of consistency among the survey responses. We have proposed changes in the evaluation design for the second year of program operation. These changes would explore in greater detail the extent of discovery prior to referral to mediation and its relationship to outcome; the nature of mediated agreements (a more creative solution to complex problems); compliance with agreement; the effect of mediation on cases reaching impasse; the degree to which cases terminating mediation at impasse offset presumed cost savings to the court; and, the degree to which time savings accrued to attorneys is transferred to cost savings by disputants.

V. CONCLUSION

The chief advantage of the model is its integration into program activity. The process of interpreting outcome and user response is likely to raise new questions. Revision of the evaluation instruments should be in response to the information generated by the study. The system can be easily updated to capture new information as the need arises. Subsequent revisions of the evaluation instrument are likely to become richer.

Information from the evaluation is being used to refine Program design. For example, the requirements for discovery are being relaxed in the criteria for referral to the Program. The effect of this change will be monitored by the revised evaluation. Finally, the Program's data base becomes the source of longitudinal study of alternative means of dispute resolution. Follow-up study of compliance, recidivism, or long-range outcome of mediated settlement, for example, can be done with minimal effort even years after mediation terminates a case. Although the model is structured for periodic analysis on a personal computer, more sophisticated analysis can be performed by exporting data to a main-frame computer.

Field experiments like the study of the mediation Program contribute to our understanding of alternative dispute resolution. The model proposed in this Article offers an efficient means of evaluating a community mediation program with long term gains for both the practitioner and the research community.